QUESTIONS PRESENTED

1. Whether the Fourth Amendment permits law enforcement officials to examine the contents of a wallet that has been seized from an arrestee's person at the stationhouse in the course of booking him on criminal charges.

2. Whether law enforcement officers were required to obtain a warrant before conducting a chemical analysis of a liquid substance contained in a jug seized from petitioner's van at the time of his arrest.

3. Whether the trial court properly admitted co-conspirator hearsay statements.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2264

EDWARD LONEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A-1 to A-2) is reported at 676 F. 2d 688 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1982 (Pet. App. A-2). A petition for rehearing was denied on May 10, 1982 (Pet. App. A-3). The petition for a writ of certiorari was filed on June 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiracy to distribute methamphetamine and of the underlying substantive offense, in violation of 21

U.S.C. 841 and 846. He was sentenced to concurrent terms of five years' imprisonment on each count (C.A. App. A-6).[1] The court of appeals affirmed (Pet. App. A-1 to A-2).

Prior to trial, the district court denied petitioner's motion to suppress evidence, including the contents of his wallet and the contents of a brown jug seized from his van at the time of his arrest (Pet. App. A-14; C.A. App. A-10 to A-21). The evidence at the suppression hearing and at trial showed that in the morning of October 29, 1979, Joseph Pelligrini, a paid government informant who had been supplied with $3,000 in marked bills by DEA Agent Hershowitz, went to the home of co-defendant Joan Baisch to negotiate the sale of methamphetamine.[2] Baisch did not have a supply of methamphetamine on hand, however, and she told Pelligrini to wait until she called "Eddie," her source, at one of his two steak shops (Jan. 14, 1981 Tr. 9-12). After dialing a number listed on an advertising circular for "Ed's Steaks," Baisch asked the party on the other end of the line whether he could supply her with two ounces of methamphetamine and she also inquired about the price.[3] Baisch then quoted to Pelligrini a price of $1,200 an ounce, which he said was acceptable. After she concluded her telephone conversation, Baisch told Pelligrini to return at 2:30 p.m. to pick up the drugs. Pelligrini handed her $2,400 in marked money as payment for the two ounces (*id.* at 12-17).

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[1] "C.A. App." refers to the appendix in the court of appeals.

[2] Baisch was charged with conspiracy together with petitioner, but the charge against her was dismissed when the district court suppressed as to Baisch evidence obtained as the result of a warrantless entry into her home to effect her arrest (C.A. App. A-10 to A-14).

[3] DEA agents surveilling "Ed's Steak Shop" testified that petitioner was inside the store at the same time Baisch telephoned to discuss the drug deal (Jan. 14, 1981 Tr. 107).

Pelligrini contacted Baisch several times that afternoon to inquire whether the drugs had arrived. Each time Baisch told him that the drugs were on the way (Jan. 14, 1981 Tr. 17-20).[4] Agents stationed in the vicinity of Baisch's house saw petitioner enter at 4:25 p.m. and leave ten minutes later (*id.* at 109). After petitioner had departed, Pelligrini went to Baisch's house and Baisch handed him the methamphetamine. Baisch asked whether Pelligrini had seen "Eddie" on his way out when Pelligrini arrived to pick up the drugs. Pelligrini said that he had not (*id.* at 20-25).[5]

Petitioner was arrested after his van was stopped by DEA agents several miles from Baisch's house. Inside the van, agents discovered a one-gallon brown or amber colored jug with no label on it.[6] One of the agents detected the odor of P2P (phenyl 2 propanone), a precursor chemical for the manufacture of methamphetamine, emanating from the jug (Jan. 14, 1981 Tr. 110-111; Jan. 15, 1981 Tr. 60). Subsequent analysis disclosed that the liquid inside the jug was indeed P2P (Jan. 19, 1981 Tr. 36). Another DEA agent later discovered foil strips on the floor of the van (Jan. 16, 1981 Tr. 18).[7]

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[4]During the course of one telephone conversation, Baisch told Pelligrini that she had contacted "Ed Loney," that he had in turn contacted his source for the drugs, and that he would be at her house with the drugs at 4 p.m. (Jan. 14, 1981 Tr. 19).

[5]Pelligrini in fact had seen petitioner driving a green van in a direction away from Baisch's house as he was driving toward her house to pick up the drugs (Jan. 14, 1981 Tr. 20-21).

[6]DEA agents who had been following petitioner earlier that day saw him receive the jug from a man in a white Cadillac and place it in his van (Jan. 15, 1981 Tr. 24-25).

[7]A DEA chemist testified that P2P is always stored in a colored bottle because it is light-sensitive and direct sunlight would decompose the chemical. In addition, the chemist explained that tin foil is normally used as a catalyst in the manufacture of methamphetamine (Jan. 19, 1981 Tr. 36-37, 40-41).

Immediately after his arrest, petitioner was transported to DEA headquarters, where DEA agents conducted a thorough search of his person. In the course of the search, Agent Broughton discovered and seized two bundles of money from petitioner's pocket; one bundle contained 24 $100 bills. Broughton also looked through petitioner's wallet in the course of inventorying petitioner's possessions and found several pieces of paper with writing on them. He placed the papers back into the wallet and turned the wallet and the money over to Agent Hershowitz (Jan. 14, 1981 Tr. 112-115). Several hours later, Agent Hershowitz examined the wad of 24 $100 bills and discovered that the serial numbers on 20 of them matched those given to Pelligrini. Hershowitz also reviewed the papers in petitioner's wallet, which contained notations of names of chemicals and a formula for manufacturing P2P (Pet. App. A-18 to A-19). Agent Hershowitz stated that he looked in petitioner's wallet "for basically intelligence information" (*id.* at A-22).

ARGUMENT

1. Petitioner contends (Pet. 6-10) that the warrantless search of his wallet conducted by Agent Hershowitz violated the Fourth Amendment. This contention does not warrant review.

To begin with, even if petitioner's rights were violated by the search of his wallet, the introduction of the evidence discovered as a result of the search may be disregarded as harmless error in light of the overwhelming nature of the other evidence of petitioner's guilt. The circumstances surrounding Baisch's telephone calls to petitioner's steak shop to discuss the purchase of methamphetamine, petitioner's presence at Baisch's house minutes before Baisch handed the drugs to Pelligrini, and the seizure from petitioner's person of the marked money that Pelligrini had previously given to Baisch all point directly to petitioner as Baisch's source for the methamphetamine that she sold to Pelligrini.

The notes found in petitioner's wallet were clearly of little or no significance in comparison with the other persuasive evidence against petitioner.

Second, although the permissibility of searches of an arrestee's wallet at the stationhouse presents an interesting question of Fourth Amendment law that perhaps might warrant review in an appropriate case, this is not such a case. Because the courts of appeals thus far have uniformly upheld such searches (see page 6, *infra*), and because the court below affirmed petitioner's conviction by judgment order without writing an opinion, this case presents a poor vehicle in which to address the Fourth Amendment issue.

Moreover, petitioner's Fourth Amendment claim is without merit. Petitioner chooses to focus his attack on the second search of the wallet, which occurred several hours after petitioner had been taken into custody. But the contents of petitioner's wallet had already been examined in the course of inventorying petitioner's possessions shortly after his arrest. Because the initial search of the wallet was proper, the subsequent reexamination of the wallet's contents did not invade any area in which petitioner retained a substantial, independent privacy interest.

It is well settled that once a suspect is arrested on probable cause, a full search of his person in reasonable under the Fourth Amendment. See *United States* v. *Robinson*, 414 U.S. 218, 235 (1973); *New York* v. *Belton*, 453 U.S. 454, 459 (1981). The mere fact of a lawful arrest operates to reduce, if not eliminate altogether, any legitimate expectation of the privacy of his person that the arrestee may have enjoyed prior to the arrest, and justifies the search of any object, such as the cigarette case in *Robinson*, found on the arrestee's person.

This reduced expectation of privacy in an arrestee's person remains after he is transported to the jailhouse:

> "While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence."

United States v. *Edwards*, 415 U.S. 800, 808-809 (1974), quoting *United States* v. *DeLeo*, 422 F. 2d 487, 493 (1st Cir. 1970). Thus, under *Edwards*, any search of the arrestee's person which could have been conducted contemporaneously with the arrest can also be conducted some time later at the station house.

This principle applies not only to searches of clothing worn by the arrestee, as in *Edwards*, but also to searches of articles, such as wallets, carried in the pockets of the arrestee's clothing. Accordingly, the courts of appeals that have addressed the question have consistently upheld the search of an arrestee's wallet at the stationhouse after the arrestee has been taken into custody. See *United States* v. *McEachern*, 675 F. 2d 618, 622 (4th Cir. 1982); *United States* v. *Passaro*, 624 F. 2d 938, 943-944 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981); *United States* v. *Ziller*, 623 F. 2d 562 (9th Cir.), cert. denied, 449 U.S. 877 (1980); *United States* v. *Phillips*, 607 F. 2d 808, 809-810 (8th Cir. 1979); *United States* v. *Castro*, 596 F. 2d 674, 677 (5th Cir.), cert. denied, 444 U.S. 963 (1979); *United States* v. *Sheehan*, 583 F. 2d 30, 31-32 (1st Cir. 1978).[8]

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[8]But see *United States* v. *Monclavo-Cruz*, 662 F. 2d 1285 (9th Cir. 1981), where the court held that the warrantless search of the defendant's purse at the stationhouse violated the Fourth Amendment. While we believe that *Monclavo-Cruz* was wrongly decided, and that police should be permitted to examine the contents of an arrestee's purse as part of the booking process, that case is of no help to petitioner because the Ninth Circuit in that case expressly reaffirmed its earlier decisions (*United States* v. *Passora, supra; United States* v. *Ziller, supra*) upholding searches of wallets at the stationhouse. 662 F. 2d at 1290.

Petitioner's reliance on *United States* v. *Chadwick*, 433 U.S. 1 (1977), is misplaced. Petitioner fails to distinguish between an arrestee's expectation of privacy with respect to his person following his arrest and the separate expectation of privacy that an arrestee enjoys with respect to possessions within his immediate control. Although containers within an arrestee's immediate control may be searched without a warrant contemporaneously with the arrest under a search incident to arrest rationale (see *Chimel* v. *California*, 395 U.S. 752 (1969); *New York* v. *Belton*, *supra*), a search of such objects may not be justified as incident to arrest if it is remote in time and place from the arrest. See *United States* v. *Chadwick*, *supra*, 433 U.S. at 15. In contrast, as *Edwards* makes clear, a search of the person of an arrestee may be undertaken at a time and place removed from the arrest itself.[9]

2. Petitioner next argues (Pet. 10-11) that his Fourth Amendment rights were violated when the agents, without first obtaining a warrant, subjected to chemical analysis the contents of the jug that had been seized from his van. This claim is also without merit.

Petitioner does not challenge the seizure of the jug. Instead, he argues that a warrant was required before the jug could be opened and its contents analyzed. No warrant was needed to open the jug, however, since it was discovered

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[9]This distinction, between searches of the arrestee's person and searches of objects within his control, was explicitly recognized in *Chadwick*, where the Court stated (433 U.S. at 16 n.10):

> Unlike searches of the person, *United States* v. *Robinson*, 414 U.S. 218 (1973); *United States* v. *Edwards*, 415 U.S. 800 (1974), searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. Respondents' privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest.

in the course of a lawful search of petitioner's vehicle. See *United States* v. *Ross*, No. 80-2209 (June 1, 1982). A strong odor of P2P, an ingredient essential to the manufacture of methamphetamine, was detected inside petitioner's van. The agents traced this odor to the translucent jug, which contained a liquid substance. In these circumstances, the agents were justified in opening the jug for further inspection.

Nor were the agents required to obtain a warrant before analyzing the liquid inside the jug. We note that if petitioner's claim had merit, virtually all drug cases that have heretofore been prosecuted would have entailed Fourth Amendment violations, since once law enforcement officers are legally in possession of drugs, they routinely subject them to chemical analysis before trial without obtaining a warrant or consent for such procedure.

In any event, once law enforcement officers are lawfully in possession of a druglike substance, its owner has no significant residual privacy interests in avoiding chemical analysis of the substance. See *Cardwell* v. *Lewis*, 417 U.S. 583 (1974), in which the plurality held that once law enforcement officers had legally seized the defendant's car, they required neither a warrant nor consent to remove paint samples from that car in order to compare them with paint that had been found in the car of the victim. Moreover, we doubt that petitioner had any legitimate expectation of privacy in the liquid contents of the jug. The substance was left in a translucent bottle in plain view inside petitioner's van. In these circumstances, a warrant was not required before the contents of the translucent container were analyzed to determine their chemical composition. See *People* v. *Adler*, 50 N.Y.2d 730, 737 n.4, 409 N.E.2d 888, 891 n.4, 431 N.Y.S.2d 412, 416 n.4, cert. denied, 449 U.S. 1014 (1980).

3. Petitioner argues (Pet. 11-14) that Baisch's statements were inadmissible as co-conspirator declarations because, in petitioner's view, the government failed to prove by a preponderance of independent evidence that a conspiracy existed between Baisch and petitioner. This argument is insubstantial. Contrary to petitioner's claim, the independent evidence was more than sufficient to justify the admission of the co-conspirator's declarations against him under Fed. R. Evid. 801(d)(2)(E).

DEA agents observed petitioner at Ed's Steak Shop at the same time that Baisch called a number listed on a circular for "Ed's Steak Shops" to inquire about Pelligrini's purchase of methamphetamine. In addition, petitioner appeared at Baisch's house moments before she gave the methamphetamine to Pelligrini. When they arrested petitioner, the agents discovered in petitioner's pocket virtually all of the marked bills with which Pelligrini had purchased the methamphetamine from Baisch, and they found the gallon jug containing P2P, a methamphetamine precursor, in petitioner's van. Although petitioner asserts (Pet. 12 & n.4) that the evidence shows at most that petitioner agreed to sell methamphetamine to Baisch, one can hardly fail to infer from the large quantity of drugs involved in the transaction that petitioner and Baisch contemplated that the drugs would be distributed by Baisch to one or more third party purchasers. In sum, a fair preponderance of independent evidence established that petitioner participated in a drug conspiracy with Baisch to distribute methamphetamine. Accordingly, the district court properly admitted into evidence Baisch's out-of-court statements made in the course of and in furtherance of the conspiracy, in which she identified petitioner as her source.

Petitioner further argues (Pet. 14) that the admission of Pelligrini's account of Baisch's out-of-court declarations denied him an opportunity to confront Baisch, in violation of the Sixth Amendment. This claim is also without merit.

Here, the reliability of the evidence "can be inferred without more" by virtue of the fact that "the evidence falls within a firmly rooted hearsay exception." *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980). Moreover, the challenged evidence bears sufficient " 'indicia of reliability' " to afford " 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' " *Mancusi* v. *Stubbs*, 408 U.S. 204, 216 (1972), quoting *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion; citation omitted). Baisch's statements were made at a time when she had no reason falsely to inculpate herself or others. She had known Pelligrini for years and had no knowledge that he was a government informant. The courts of appeals have consistently accepted similar indicia as a basis for finding co-conspirator hearsay statements sufficiently reliable to satisfy confrontation clause concerns. See *United States* v. *Kendricks*, 623 F. 2d 1165, 1167-1168 (6th Cir. 1980); *United States* v. *Archbold-Newball*, 554 F. 2d 665, 677 (5th Cir.), cert. denied, 434 U.S. 1000 (1977); *United States* v. *Papia*, 560 F. 2d 827, 836 n.3 (7th Cir. 1977); *United States* v. *Goodman*, 605 F. 2d 870, 876-878 (5th Cir. 1979).[10]

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[10]Petitioner's reliance (Pet. 14) on *Bruton* v. *United States*, 391 U.S. 123 (1968), is misplaced. In *Bruton*, the co-defendant's post-arrest confession was not admissible as to Bruton under any applicable exception to the hearsay rule, and this Court noted the critical weight of the particular evidence in the setting of that case. 391 U.S. at 128. The Court emphasized, however, that it "intimate[d] no view whatever that * * * exceptions [to the hearsay rule] necessarily raise questions under the Confrontation Clause." *Id.* at 128 n.3. The admissibility of the out-of-court declaration in this case under Fed. R. Evid. 801(d)(2)(E) serves to distinguish this case from *Bruton*. See *Ohio* v. *Roberts*, *supra*, 448 U.S. at 65-66; *Dutton* v. *Evans*, *supra*, 400 U.S. at 85-87 (plurality opinion).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1982

DOJ-1982-08